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Nos. 80-1134, 80-1155 and 80-1170

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEAD INDUSTRIES ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

SOUTH CENTRAL BELL TELEPHONE COMPANY, ET AL.,
PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES,
INC., ET AL., PETITIONERS

v.

SECRETARY OF LABOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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MEMORANDUM FOR THE FEDERAL RESPONDENTS

Petitioners seek review of the decision of the court of appeals (Pet. App. 1a-286a)[1] that upheld in all major respects the Secretary of Labor's[2] occupational safety and health standard regulating employee exposure to airborne concentrations of lead (29 C.F.R. 1910.1025).[3]

STATEMENT

1. Pursuant to Section 6(b) of the Occupational Safety and Health Act, 29 U.S.C. 655(b), which authorizes the Secretary of Labor to promulgate standards regulating employee exposure to toxic substances, the Secretary proposed in 1975 to reduce the maximum daily permissible exposure level (PEL) for lead from 200 to 100 micrograms of lead per cubic meter of air (ug/m^3). 40 Fed. Reg. 45934 (1975). The Secretary did not specifically state that 50 ug/m^3 was under consideration as a final PEL (*ibid.*), and virtually all the technological and economic evidence developed in the rulemaking proceeding was therefore addressed to the achievability of the 100 ug/m^3 proposal (Pet. App. 171a). After full rulemaking, the Secretary enlisted the aid of private consultants. Based on the record, these consultants drew tentative conclusions for the Secretary's review (*id.* at 38a). Thereafter, on November 14, 1978, the Secretary published the final standard, which set the PEL at 50 ug/m^3. 43 Fed. Reg. 52952.

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[1] "Pet. App." refers to the appendix to the petition in No. 80-1134.

[2] For convenience, we will refer to the Secretary, the Assistant Secretary for Occupational Safety and Health, and the Occupational Safety and Health Administration as "the Secretary."

[3] The Secretary's opinion accompanying the standard appears at 43 Fed. Reg. 52952-53014 (1978) and 43 Fed. Reg. 54354-54509 (1978).

In an opinion accompanying the final standard, the Secretary explained that continued above-normal blood lead levels are linked to a number of serious neurological, renal, reproductive, and hematopoietic (blood-forming) diseases and that reduction in air lead levels would decrease the blood lead levels of exposed employees. 43 Fed. Reg. 54354-54400 (1978). The Secretary also found that the affected industries could attain the 50 ug/m^3 level through the use of respirators. *Id.* at 52977.

At the same time, the Secretary established a time schedule whereby specified categories of affected industries would phase out general reliance on respirators and conform employee exposure to the PEL through engineering and work practice controls. 29 C.F.R. 1910.1025(e)(1). The large majority of industries were given one year to achieve compliance with the PEL without reliance upon respirators. Compliance periods of five to ten years were set for five specified industries[4] that were thought by the Secretary to face major obstacles in reaching the 50 ug/m^3 without substantial reliance on respirators. *Ibid.*

The Secretary was guided in his assessment of the time periods required by each of these five industries to meet the 50 ug/m^3 level by his interpretation of the feasibility limitation of Section 6(b)(5) of the Act, 29 U.S.C. 655(b)(5). Under the Secretary's interpretation, a standard was considered to be "feasible" if technology exists or can foreseeably be developed so that "industry as a whole is able to comply,"

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[4] Primary lead smelting, secondary lead smelting, battery manufacturing, brass and bronze foundries, and pigment manufacturing.

and if the standard does not "imperil the existence" of the industry. 43 Fed. Reg. 54474, 54476 (1978). The Secretary concluded that it was technically possible for these five industries to attain the PEL (*id.* at 54479), but he recognized that certain industries, notably primary and secondary lead smelting, would have to overcome particularly intractable emission control problems (*id.* at 54478-54479). Consequently, the time schedule established by the Secretary allowed sufficient time for each industry to implement conventional control methods or to avail itself of alternative production processes. *Ibid.* The Secretary admittedly had difficulty quantifying the costs of attaining the PEL in these industries (and most notably was unable to do so with regard to primary smelting). *Id.* at 54479, 54498. However, the Secretary determined that, given sufficient time, these industries possessed the financial ability to implement necessary conventional controls or innovative processes. *Id.* at 54479.

The standard also requires that employees be temporarily removed from lead-exposed jobs, without loss of wages, if their blood lead concentrations exceed certain specified levels. 29 C.F.R. 1910.1025(k). These blood lead levels progressively decrease over the first five years following the standard's effective date. *Ibid.* The cost of this program was found to be affordable (43 Fed. Reg. 54457-54459 (1978)), a determination that rested in part on the assumed parallel decline in airborne lead levels simultaneously compelled by the standard. *Ibid.*

Finally, the standard requires that the affected industries undertake a number of ancillary measures, including periodic monitoring of airborne lead levels and the provision of clean protective clothing. 29 C.F.R. 1910.1025(f), (g).

The Secretary did not undertake a formal comparison to determine whether there was a "reasonable relationship" between the costs of the standard and its benefits to employees. 43 Fed. Reg. 54431 (1978). The Secretary rejected the view that such a "cost-benefit" analysis must be made. *Ibid.*

2. The court of appeals, by divided vote, upheld the lead standard in all major respects, but acknowledged that a number of important questions on appeal were "very close." Pet. App. 9a n.6. The court rejected petitioners' contention that they had not received notice that the Secretary might set a permissible limit below the 100 ug/m^3 standard that was initially proposed. The court pointed out, however, that "OSHA would have served the parties far better," particularly with respect to the development of feasibility evidence for the 50 ug/m^3 level, "had it listed in the proposal two or more alternative PEL's and invited comments on each." *Id.* at 51a, 171a.

With respect to petitioners' substantive claims, the court concluded (Pet. App. 108a-109a) that the Secretary's finding of a need to regulate employee exposure to lead was consistent with this Court's decision in *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Institute*, No. 78-911 (July 2, 1980). Although virtually all evidence regarding the technological and economic feasibility of the permissible exposure level focused on the 100 ug/m^3 proposal, the court of appeals approved the Secretary's approach in evaluating feasibility (Pet. App. 171a-172a). However, the court affirmed the application of the engineering and work practice control provision as to only ten industries.[5] With respect to the remaining

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[5] These industries are: primary smelting, secondary smelting, battery manufacturing, can manufacturing, wall paper

industries, the court remanded for consideration by the Secretary, with directions to return the standard with full explanation within six months. Pet. App. 225a-226a & n.162, 246a-247a.[6] The court of appeals also upheld (*id.* at 65a, 83a) the Secretary's medical removal protection provision for all industries.

Finally, on the basis of its earlier decision upholding the Secretary's standard regulating occupational exposure to cotton dust, the court of appeals rejected petitioners' contention that the lead standard was invalid because the Secretary failed to undertake a formal cost-benefit analysis in fixing the PEL. See *AFL-CIO* v. *Marshall*, 617 F.2d 636 (D.C. Cir. 1979), cert. granted, Nos. 79-1429 and 79-1583 (Oct. 6, 1980).

DISCUSSION

1. On February 17, 1981, the President issued Exec. Order No. 12291, directing all federal agencies to assess potential costs and benefits of major regulatory proposals. See 46 Fed. Reg. 13193 (1981). In light of this directive, the Secretary has determined to undertake a reexamination of both the lead and the cotton dust standards. Thus, the Secretary issued an Advance Notice of Proposed Rulemaking for the cotton dust standard on March 27, 1981. 46 Fed. Reg. 19501-19503. At the same time, the Secretary filed a supplemental

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manufacturing, grey iron foundries, ink manufacturing, electronics, paints and coatings manufacturing, and painting.

[6] The remand proceedings have been completed, and the record was returned to the court of appeals. Thereafter, the Secretary and certain industry parties jointly moved to hold in abeyance further proceedings before the court of appeals while the Secretary evaluated the industries' petitions for reconsideration.

memorandum in *American Textile Manufacturers Institute* v. *Donovan*, Nos. 79-1429 and 79-1583 (filed Mar. 27, 1981), which informed the Court of this action and suggested that "the Court may wish to refrain from further consideration of the issues now before it in th[ose] pending cases" (Federal Respondents' Supp. Mem. at 4).

For the same reasons, the Secretary requests that the Court grant the petitions for certiorari in the instant cases, vacate the judgment of the court below, and order the record remanded to the Secretary for further development. On April 17, 1981, the Secretary issued an Advance Notice of Proposed Rulemaking with respect to the lead standard. See Appendix, *infra*. As the Advance Notice explains, the Secretary intends to reopen the record in the lead proceeding for the purpose of evaluating the feasibility and utility of cost-benefit analysis in the standard-setting process, comparing (if feasible) the costs and benefits of the current (50 ug/m^3) lead standard with those of various specific alternatives, and reassessing the current standard in light of the findings. It is the Secretary's view that an assessment of the practicality of cost-benefit balancing is best achieved in the context of an actual standard and in a manner that permits public comment. Thus, the Secretary will seek complete cost estimates for compliance with the current permissible exposure level and other suggested permissible exposure levels, as well as cost estimates for other proposed means of providing protection to employees exposed to lead.

Petitioners contend that the Secretary, in setting an OSHA toxic substance standard, must establish that its costs bear a "reasonable relationship" to its benefits (LIA Pet. 17-19; NARI Pet. 25). Petitioners thus seek review on an issue that will be the subject

of further rulemaking. The Secretary believes that the information, data, and comments likely to be received through the public proceeding announced in his Advance Notice will permit him to make an informed judgment about the feasibility and utility of cost-benefit analysis in this area. The experience gained here and in the companion cotton dust proceeding, as well as the comparative experience under other health and safety laws (see 29 U.S.C. 655(b)(5)), will enable the Secretary to determine the usefulness vel non of cost-benefit analysis in setting toxic substance standards, which bears on the legality of employing that analysis in the standard setting process because of the statutory requirement that standards be based on the "best available evidence" (*ibid.*). For these reasons, the Secretary believes that the Court should refrain from considering the cost-benefit issue presented by petitioners.

2. In the supplemental rulemaking proceeding, the Secretary intends to reconsider not only the feasibility and utility of cost-benefit analysis in the setting of standards, but also the other issues presented in these petitions. Thus, review by this Court of the lead standard would be inappropriate at the present time, even if the Court decides to rule on the cost-benefit question now before it in *American Textile Manufacturers Institute* v. *Donovan*, Nos. 79-1429 and 79-1583.

Specifically, petitioners question whether the continued economic viability of the regulated industries is the proper test for assessing the economic feasibility of an OSHA toxic substance standard (LIA Pet. 13-14; NARI Pet. 18-23). Petitioners also challenge the Secretary's technological feasibility findings, particularly his reliance on innovative technology in

drawing his conclusions (LIA Pet. 10-13; NARI Pet. 17). The Secretary's Advance Notice requests more detailed information concerning such critical questions as the present state of development of relatively recent innovations that could revolutionize such industries as primary and secondary lead smelting. The Secretary has also requested cost estimate data for the more innovative technology on which many of the feasibility findings for the current lead standard rest—data that are not currently in the administrative record, but that now appear to be available. Likewise, the Secretary has requested the most recent information on the financial strength and the capital needs and structure of the affected industries. As a result, it is possible that some of the standard's requirements will be modified to such an extent that petitioners will no longer be aggrieved. In addition, development of the record in these areas will certainly eliminate petitioners' claim (LIA Pet. 21-22; NARI Pet. 15-16) that they were afforded inadequate notice of the PEL ultimately promulgated.[7]

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[7] South Central Bell also contends (Pet. 6-10) that application of the lead standard to the telecommunications industry is invalid because the Secretary failed to make a threshold finding that this industry's employees, whose exposure is alleged to be infrequent, face a "significant risk" of lead-related disease. See *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Institute, supra,* slip op. 42. The new rulemaking will specifically address the extent of risk presented by extremely intermittent exposure, as well as the extent of exposure that employees face in the telecommunications industry. Similarly, the other petitioners' claim (LIA Pet. 19-21; NARI Pet. 26-27) that the medical removal protection provision of the standard is invalid may be eliminated. Although the Advance Notice states that the question of the Secretary's statutory authority to require medical removal protection will not be reopened, the Secre-

In light of the proposed supplemental proceedings, a decision by the Court at this time would, to a substantial degree, be tantamount to an advisory opinion. Cf. *EPA* v. *Brown*, 431 U.S. 99, 103-104 (1977).[8] If the Secretary determines that a new lead standard should be promulgated, it is possible that no "person who may be adversely affected by [the] standard" will seek preenforcement review (29 U.S.C. 655(f)) in the court of appeals or in this Court. Even if the new standard is challenged, however, some issues presented would be capable of resolution only by reference to the supplemental rulemaking record.

3. Accordingly, the Secretary believes that it would be appropriate for the Court to grant the petitions for certiorari, vacate the judgment of the court of appeals, and remand the case so that the record may be returned to the Secretary for further consideration and development. See *Cotton Warehouse Ass'n* v. *Marshall*, vacated and remanded, No. 79-1789 (Oct. 6, 1980); Rule 13(d), Gen. R. D.C. Cir.

During the pendency of the proposed administrative proceedings, it is the Secretary's intention that the lead standard now in effect (including an ambient air

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tary has requested information and comments on whether the particular "triggers" (the blood lead levels that require employee removal) should be readjusted. Should such revision occur, petitioners may decide not to seek judicial review of this provision. Finally, petitioners' challenge (LIA Pet. 22-24) to the use of post-hearing reports prepared by outside consultants on the feasibility of the 50 $\mu g/m^3$ level is likely to be remedied by the new rulemaking proceedings.

[8] Of course the Secretary's action with respect to the lead standard does not moot the controversy between the parties at this time. As we have shown, however, the proposed rulemaking proceedings may obviate the need to address many of petitioners' current claims.

standard of 50 *ug*/m³ obtained through the use of respirators) should be left undisturbed. Lead is a deadly toxic substance with adverse health effects nearly as numerous as its many industrial uses. Consequently, the Secretary intends to continue to enforce the currently effective portions of the existing standard in order to provide the necessary protection for the employees at risk. During the past two years, the affected industries have been required to put into place most of the standard's protective measures, the major exception being the requirement that engineering controls be installed.[9] Completion of the latter obligation has been stayed by the court of appeals and by this Court. There was general agreement during the rulemaking proceeding on the necessity for such currently effective provisions as respirator usage, medical surveillance, and safe work practices. It is therefore unlikely that a modified standard would not contain these provisions.[10]

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[9] A number of employers have petitioned the Secretary to suspend for one year the imminently effective requirement that employees be removed from lead-exposure jobs if their blood lead levels exceed 60 *ug* per 100 grams of whole blood. 29 C.F.R. 1910.1025(k)(1)(i)(C); see 29 C.F.R. 1910.1025(k)(1)(iii)(A)(*3*). The Secretary has temporarily stayed that provision in order to consider the employers' claim of infeasibility.

[10] There is ample precedent for preserving the status quo in these circumstances. See Federal Respondents' Supp. Mem. in *American Textile Manufacturers Institute* v. *Donovan*, *supra*, at 5 n.3.

CONCLUSION

The petitions for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded with directions to return the record to the Secretary for further administrative proceedings.

Respectfully submitted.

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APPENDIX

[4510-26-M]

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1010

[Docket No. H-004E]

Occupational Exposure to Lead

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor

ACTION: Advance Notice of Proposed Rulemaking

SUMMARY: Notice is given that the Occupational Safety and Health Administration will shortly be undertaking, through rulemaking procedures under section 6 of the Occupational Safety and Health Act of 1970, a reevaluation and reconsideration of the occupational health standard regulating exposure to lead, 29 CFR 1910.1025. The purpose of this proceeding is to review the technological and economic feasibility of complying with the regulation. The economic consequences of the regulation will be reexamined on two bases. First, the affected industries' ability to comply with the standard will be reexamined. Second, a cost-benefit analysis will be performed, in order to assess the practicality of relying on this approach in setting occupational health standards in the context of a specific regulation. A parallel reevaluation will be performed for the cotton dust standard. *See* 46 FR 19501-19503 (March 31, 1981).

All provisions of the lead standard will be subject to reexamination. In particular, the economic and

technological feasibility of the present permissible exposure limit of 50 micrograms of lead per cubic meter of air (50 ug/m^3) averaged over an eight-hour day, and of the medical removal protection provision of the regulation, will be subject to analysis. Additionally, for a few industries where employees appear to be exposed to lead on an intermittent basis, the question whether the employees face a significant risk of lead-related disease will be addressed. At this time, public participation is invited on the issues raised by such reevaluation and as to whether other matters relating to the hazards and regulation of lead should be addressed.

DATES: Comments, suggestions and information are invited regarding this Advance Notice of Proposed Rulemaking by June 1, 1981.

ADDRESSES: Comments should be submitted to the Docket Officer, Occupational Safety and Health Administration, Docket No. H-004E, Room S-6212, U.S. Department of Labor, 3rd and Constitution Avenue, N.W., Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

1. *Introduction*

On October 3, 1975, the Occupational Safety and Health Administration (OSHA) proposed a standard for occupational exposure to lead (40 FR 45934)

which would limit the maximum permissible lead exposure (PEL) of employees to 100 ug/m^3 (micrograms of lead per cubic meter of air). The new standard was to supersede the previous national consensus standard which limited lead exposure to 200 ug/m^3, and which had been adopted by OSHA pursuant to section 6(a) of the Occupational Safety and Health Act (Act). The proposal explained that the necessity for a more stringent and comprehensive regulation was based on the substantial body of scientific and medical evidence showing that lead has adverse effects on the health of workers in the lead industry; that evidence showed that lead results in damage to the nervous, urinary and reproductive systems, and inhibits synthesis of the molecule heme, which is responsible for oxygen transport in living systems. Informal rulemaking proceedings were conducted on the proposal. On November 14, 1978, a final standard which limited occupational exposure to airborne concentrations of lead to 50 ug/m^3 based on an 8-hour time weighted average (TWA) was published in the Federal Register (43 FR 52952). Additional protective provisions such as environmental monitoring, recordkeeping, employee education and training, medical surveillance, medical removal protection, and hygiene facilities, were included in the standard. Supplemental attachments were published on November 21, 1978 (43 FR 54354).

Immediately after promulgation, the lead standard was challenged by both industry and labor groups in the United States courts of appeals. All cases were transferred and consolidated in the U.S. Court of Appeals for the District of Columbia Circuit. On March 1, 1979, the D.C. Circuit partially stayed the lead standard by delaying the requirement for installing engineering controls and instituting work practices. However, the requirement to meet the PEL using

respirators, and provisions for environmental monitoring, recordkeeping, employee education and training, medical surveillance, and medical removal protection were not stayed and became effective on March 1, 1979.

In an opinion issued on August 15, 1980, the court of appeals upheld the validity of OSHA's lead standard in most respects, acknowledging that a number of important questions on appeal were "very close." The court rejected the industry petitioners' contentions that they had not received notice that OSHA might set a permissible limit below the 100 ug/m^3 standard that was initially proposed, and that OSHA had improperly relied on information not in the public record in reaching its decisions on the standard. The court also concluded that OSHA's finding of a health need to reduce the permissible lead limit was consistent with the Supreme Court's decision in *Industrial Union Dep't* v. *American Petroleum Institute*, No. 78-911 (July 2, 1980), which requires OSHA to show that employees will face a "significant risk" of harm if a new regulation is not issued. The court of appeals additionally concluded that the medical removal protection provision was authorized by the statute, that it was reasonably necessary, and that it was affordable by industry.

With respect to feasibility, the court of appeals found that feasibility simply meant "capable of being done," without regard to whether the costs are justified in light of the benefits. On that basis, the court affirmed OSHA's finding that the following ten industries could feasibly comply with the 50 ug/m^3 PEL through engineering and work practice controls: primary smelting; secondary smelting; printing; can manufacturing; battery manufacturing; paint and coatings manufacturing; ink manufacturing; wallpaper manufacturing; electronics manufacturing;

and gray-iron foundries. However, the court found that OSHA had failed to present substantial evidence or adequate reasons to support the feasibility of the PEL in the remaining industries, and remanded the record to the agency for reconsideration of that issue.

The court directed OSHA to return the standard with full explanations within six months. The court also continued, for those industries subject to the remand, the limited stay that had been in effect pending review. With respect to the ten industries for which the standard was held fully applicable, the stay was dissolved.

Since the issuance of the court of appeals' August 15 decision, proceedings have taken place simultaneously before the Supreme Court and the agency. Organizations representing the primary lead smelters (Lead Industries Association, or LIA) and the secondary lead smelters (National Association of Recycling Industries, Inc., or NARI), sought a stay pending review by the Supreme Court. On December 8, 1980, the Supreme Court granted that request in part, notably staying for all industries the requirement that the 50 $\mu g/m^3$ standard be achieved through engineering and work practice controls.

LIA and NARI subsequently filed petitions for review in the Supreme Court, as did the South Central Bell Telephone Company. In their petitions, these groups alleged that the standard is invalid on numerous grounds, including lack of adequate notice; improper reliance by the agency on *ex parte* contacts; absence of a finding of significant risk for employees whose exposure is only intermittent; failure by the agency to justify the standard on a cost-benefit basis; absence of evidence supporting the technological and economic feasibility of reaching the 50 $\mu g/m^3$ PEL in the primary and secondary smelting industries; and lack of statutory authority for medical removal

protection. The petitions are currently pending before the Supreme Court and no decision as to whether the Court will hear the case has been issued. Contemporaneous with this Advance Notice, a memorandum in response to the petitions is being filed with the Supreme Court asking that the Court grant the petitions, vacate the judgment of the court of appeals, and remand the rulemaking record to the agency.

With regard to the remanded industries, OSHA published a Federal Register notice on September 24, 1980 (45 FR 63476) which reopened the rulemaking record and scheduled a hearing for the purpose of soliciting additional information pertaining to the technological and economic feasibility of meeting the 50 ug/m^3 PEL solely by engineering and work practice controls. Other issues, such as the significance of the risk employees face in particular industries, and the propriety of reliance on cost-benefit analysis in setting standards, were not reopened. OSHA set time periods for the submission of comments and notices of intention to appear at the hearing (by October 27, 1980), and for the informal public hearing (November 5-7, 1980). The record remained open for the receipt of additional comment and data until December 1, and for posthearing argument until December 10, 1980.

On January 13, 1981, OSHA issued its supplemental statement of reasons with regard to the technological and economic feasibility of the PEL for 46 specified industries or occupations (46 FR 6134, Jan. 21, 1981). For most of the 46 categories, OSHA found that the standard was feasible. For a few industry categories, OSHA found that feasible control measures are available but that an extension in the compliance schedule was needed to assure the feasibility of their implementation. For some operations within certain industries, OSHA found that respira-

tory protection may be the only technologically feasible means of compliance.

The supplemental statement of reasons was submitted to the D.C. Circuit on January 19. Thereafter, because several industry groups informed the agency of their intention to file administrative requests for reconsideration of the remand decision, OSHA and the industry petitioners jointly filed a motion with the D.C. Circuit asking that further judicial proceedings be held in abeyance pending the agency's action on the reconsideration requests. The court has not yet acted on that motion.

The industry requests for reconsideration were filed with the agency on February 26 and 27, 1981. The following parties, among others, filed reconsideration requests: LIA, the Shipbuilders Council of America, South Central Bell Telephone Company and AT & T. LIA has alleged that the remand proceedings were procedurally defective. It has also asserted that the standard is invalid due to the absence of industry-specific findings regarding the significance of the risk, as well as the absence of any cost-benefit or cost-effectiveness analysis justifying the primary reliance on engineering controls and the 50 ug/m^3 PEL. In addition, LIA has alleged that the findings of economic and technological feasibility are inadequate or unsupported for the following seven industries or operations: copper smelting, nonferrous foundries, silver refining, spray painting, stevedoring, steelmaking, and zinc smelting and refining. The Shipbuilders Council has maintained that the shipbuilding and repair industry should be exempted from the lead standard because: the agency failed to make adequate findings of the technological and economic feasibility of compliance; reliance on engineering controls is unwarranted; and the high mobility and high turn-

over of the workforce makes regulation unnecesasry and inappropriate. South Central Bell and AT & T have maintained the telecommunications industry should be exempted for similar reasons.

Several industry groups (including LIA and the Secondary Lead Smelters Association) have also requested that the next "trigger" making the medical removal provision more stringent, which was scheduled to go into March 1, 1981, be suspended for one year. Beginning on March 1, the standard required that workers be removed from high exposure areas (with full pay) when their blood lead levels exceeded 60 *ug*/100g (micrograms of lead per 100 grams of whole blood); employers are also required to keep these workers from such exposure until their blood lead levels had been reduced below 40 *ug*/100g. *See* 29 CFR 1910.1025(k)(1)(i)(C) and (k)(1)(iii)(A)(*3*). The industry petitioners have claimed that implementation of the 60/40 trigger will compel the removal of skilled tradesmen in numbers that will severely affect plant production, and will be extremely expensive. They have suggested that OSHA's assumptions about compliance through engineering controls (upon which the correlating cost calculations for medical removal were premised), have lost all meaning because the engineering control requirement has been stayed since the issuance of the standard. The agency granted a thirty-day suspension of the trigger to study this request (46 FR 14897, March 3, 1981). OSHA has also requested additional information from the industry petitioners. A second delay of the effective date of the provision, until May 1, 1981, was published on March 27, 1981 (46 FR 18974).

Finally, even apart from industry's requests for reconsideration and stay discussed above, the agency determined that the January 13 supplemental state-

ment of reasons should be subject to review (46 FR 11254, Feb. 6, 1981).

2. *Reasons for Conducting a Proposed Rulemaking*

OSHA has concluded that the lead standard should be reconsidered for several reasons. First, a new rulemaking is appropriate because the agency has now concluded that it should reexamine the position, taken in issuing the lead rule and other standards, that it would be inconsistent with the Act for OSHA to set a toxic substance standard on the basis of a cost-benefit analysis. That the appropriateness of cost-benefit analysis in the application of regulatory policy is of vital concern to the national welfare and the national government is evidenced by the recent establishment of the Presidential Task Force on Regulatory Relief, chaired by the Vice-President, and the recently issued Executive Order No. 12291 which mandates such analysis in certain rulemaking (46 FR 13193). The policy underlying that Order is that cost-benefit analysis is a useful device in the regulatory decision-making process. Other safety and health agencies, although administering different statutes with somewhat different purposes, have found that the cost-benefit technique or variants thereof are useful in their decision making processes. *See Consumer Products Safety Commission, Proposed Methodology for Commission Consideration of Findings Under Section 9(c) of the Consumer Products Safety Act*, 45 FR 85772 (Dec. 30, 1980); *Environmental Protection Agency, National Emission Standards for Hazardous Air Pollutants; Policy and Procedures for Identifying, Assessing, and Regulating Airborne Substances Posing a Risk of Cancer*, 44 FR 58642 (1979). In consonance with the policy of the

Executive Order, it is the agency's view that it is appropriate to evaluate the practicality of cost-benefit balancing by investigating the concept in the context of an actual standard such as lead, and in a manner which permits public comment. A similar analysis will be performed for the cotton dust standard. *See* 46 FR 19501-19503 (March 31, 1981).

The agency intends to invite the submission of all information relevant to an assessment of the relationship between the rule's benefits and its costs. In particular, information will be sought concerning the use of respirators as an alternative to engineering controls. The interrelationships between the type of economic analysis which OSHA has traditionally performed and cost-benefit techniques will also be a subject of the new rulemaking. The agency will additionally address whether, based on the cost-benefit analysis, an individual PEL should be set for each industry.

In the agency's view, all this information and data, as well as the public input which will be provided in the rulemaking proceeding, will permit the agency to produce a comprehensive and thorough cost-benefit analysis. This experience, plus the comparative experience under other health and safety laws (a comparison mandated by 29 U.S.C. 655 (b) (5)), will enable the agency to decide under what circumstances it is appropriate and practical to factor such an analysis into setting toxic substances standards.

Second, even independent of cost-benefit grounds, the agency has concluded that it is appropriate to reassess the technological and economic feasibility of the 50 ug/m^3 standard (*i.e.*, the industries' ability to comply with the standard). Since no data specifically addressing the feasibility of attaining the

50 ug/m^3 PEL was submitted at the original rulemaking, the agency's conclusion that the 50 ug/m^3 PEL was feasible was based on extrapolation from the evidence submitted concerning the proposed 100 ug/m^3 PEL. The agency believes that a more complete record could be developed if affected parties are given the opportunity to specifically address the propriety of a 50 ug/m^3 PEL, as well as other PELs which could be set. And while the feasibility of the 50 ug/m^3 PEL in the "remand" industries was addressed anew in the supplemental administrative proceedings, the affected parties have suggested that the short time frame of that rulemaking was inadequate to permit a proper record to be developed. Moreover, the ten industries for which the standard was upheld in whole by the court of appeals were not given this supplemental opportunity to submit data. A new rulemaking proceeding will remedy these perceived deficiencies. It will thereby ensure that the standard which is ultimately set is firmly grounded on the best available evidence.

Reevaluation of the feasibility question would appear to be particularly warranted with regard to the primary and secondary smelting industries because the conclusion that the present standard is feasible for these industries was premised in part on the possibility that innovative developments in process and control technology could contribute to significant air lead reductions. New information concerning the viability of these innovative technologies has now come to the agency's attention. For example, in the statement of reasons to the present standard, OSHA suggested that rather than retrofit existing pyrometallurgical equipment, the primary lead smelting industry might opt to comply with the standard by rebuilding their production facilities to utilize a new,

cleaner, smelting process called hydrometallurgy. OSHA based its prediction that the hyrometallurgical process would be commercially available within ten years (the time period granted the primary smelting industry for compliance) on evidence showing that a small scale laboratory experiment using the hydrometallurgical process was being conducted by the Bureau of Mines. Since promulgation of the standard, that laboratory trial has been successfully completed, and a larger scale pilot hydrometallurgical project has been constructed. OSHA believes that the data which can be obtained from this larger scale project may be useful in determining the precise extent to which hydrometallurgy can reduce ambient lead levels.

The data from the pilot hydrometallurgical project, as well as other new information, may also enable the agency to quantify the predicted costs of compliance with the 50 ug/m^3 level for the primary smelting industry. The agency believes the costs of any standard should be estimated if it is possible to do so. OSHA's statement of reasons to the lead standard, however, did not specify the dollar costs of compliance for this industry. Although a quantification of the costs of achieving compliance by innovative technology may not have been possible at the time the standard issued, the new data may provide the foundation for such a calculation.

Moreover, OSHA's review of the rulemaking record to the original standard suggests that the data and the formula for computing the primary smelting industry's costs of compliance with the 50 ug/m^3 PEL using *conventional* controls are presently available. No calculation was made by the agency prior to the standard's promulgation. Since the rulemaking rec-

ord will be reopened, the agency may be able to now compute these costs, and to subject the analysis to public comment.

Similar revisions in the feasibility analysis for the secondary lead smelting industry may be warranted. In its statement of reasons, OSHA suggested that rather than retrofit existing equipment, this industry might prefer to rebuild their production facilities using the new Bergsoe SB furnace, which was in place in a secondary smelting facility in Sweden that had achieved fairly low air lead levels. Industry questioned the utility of converting to the Bergsoe furnace, claiming that the process will not assure the air lead reductions necessary to achieve the PEL, and that the 90 million dollar cost of converting to the process is prohibitively expensive. Recent data submitted to the agency indicates that the Bergsoe furnace in fact may not be responsible for the reduction in air lead levels attained in the Swedish facility. It now appears that the air lead reductions are attributable to that facility's use of a completely integrated ventilation system, and to meticulous housekeeping and work practices. These controls are much less expensive than the Bergsoe process; however, it appears that the air lead levels achieved through their use is somewhat higher than the 50 ug/m^3 PEL. As with the new evidence concerning the innovative processes in the primary smelting industry, the agency believes it would be useful to subject this new data to public comment, and to obtain additional information if it exists.

Third, a new rulemaking proceeding will permit OSHA to evaluate whether employees in industries such as telecommunications and stevedoring, whose exposure to lead is asserted to be intermittent, face

a "significant risk" of lead-related disease. Neither the agency's statement of reasons to the original standard nor the court of appeals' decision upholding the agency's significant risk finding specifically addressed this question. It is undisputed, however, that the model correlating blood lead levels with the 50 ug/m^3 lead level, upon which the agency's estimation of risk was premised, assumed that employees would be exposed for eight hours each workday throughout the year. Although OSHA does not believe that an industry-by-industry risk assessment is usually warranted, the fact that lead is excreted from the body upon removal from exposure suggests that the risk presented by highly intermittent exposure may be sufficiently different from that presented by chronic exposure that separate treatment is appropriate here. Therefore, in the new rulemaking proceeding, OSHA intends to solicit data on the extent of risk presented by highly intermittent exposure, and on the extent of exposure which actually occurs in the telecommunications and stevedoring industries. Any other industries which believe they deserve separate treatment on this basis should submit data to the agency as well. OSHA also welcomes suggestions as to the manner in which intermittent exposure should be treated under the standard, *e.g.*, by exempting the industries, or by amending the standard to set a minimum number of days for which employees must be exposed above a certain level before the compliance requirements of the standard will be applicable to a workplace.

Fourth, a new rulemaking will permit the agency to reassess the feasibility of the medical removal protection provision (MRP). As discussed above, several industries have requested a one-year suspension of

the 60/40 MRP trigger because they predict that the trigger will compel the removal of large numbers of skilled tradesmen and will be extremely expensive; they also suggest that these consequences may be due to the continuing stay of the engineering control requirement of the standard. Whether or not the one-year suspension is warranted if the present standard, as stayed, continues in effect, (a question which the agency is addressing separately), it is possible that if the PEL is altered as a result of the new rulemaking proceeding, the lower MRP triggers may have to be adjusted as well. This is so because the feasibility of MRP is keyed to the air lead levels present in the workplace. Accordingly, the new rulemaking will address the question of what adjustments if any, should be made to the MRP triggers. The question of the agency's authority to require MRP, however, will not be open in the new proceeding.

Finally, at this stage of the proceeding, OSHA will accept and consider suggestions as to the necessity for inquiring into other matters relevant to enforcement of the standard.

3. *Summary of Issues to be Addressed in the Proposed Rulemaking.*

In sum, OSHA invites comment on the propriety of conducting rulemaking on the following issues:

(1) Whether the PEL should be set at:

(a) 50 ug/m^3 for engineering controls;

(b) 50 ug/m^3 for any combination of controls including respirators;

(c) 100 ug/m^3 for engineering controls, combined with 50 ug/m^3 for respiratory protection;

(d) 150 ug/m^3 for engineering controls, combined with 50 ug/m^3 for respiratory protection;

(e) any other level.

(2) Whether compliance with any of the above PELs is technologically and economically capable of being achieved; and if so, in what time frame.

(3) Whether highly intermittent exposure presents a significant risk of lead-related disease, and if so, how intermittent exposure industries should be treated under the standard.

(4) Whether a cost-benefit analysis can be performed for the lead standard; if so, how.

(5) Whether the relationship between the costs and benefits of any of the proposed PELs is reasonable.

(6) Whether different PELs should be set for different industries covered by the standard.

(7) Whether the MRP "triggers" under the present standard are feasible; if not, what triggers should be set.

4. *Effect of the Reconsideration on Enforcement of the Present Standard.*

Pending the reconsideration discussed above, it is the agency's judgment that the standard, as stayed by the Supreme Court, should remain in effect and continue to be enforced. Specifically, all but the following provisions are in effect:

(1) Section 1910.25(e)(1), (4), (5), (6), which provide for compliance by engineering and work practice controls.

(2) Section 1910.1025(e)(3), which governs written compliance programs, except for paragraph (F).

(3) Section 1910.1025(f)(2)(ii), which relates to the use of respirators in situations in which engineering and work practice controls are not sufficient. During the period of the stay, employers shall provide a powered, air-purifying respirator in lieu of the respirator specified in Table II of (f)(2)(i) when the physical characteristics of the employee are such that the respirators specified in Table II are inadequate for his or her protection. All other sections of the regulation that refer to paragraph (f) shall incorporate only those portions of (f) not stayed.

(4) Section 1910.1025(i), governing hygiene facilities and practices, to the extent that it requires the construction of new facilities or substantial renovation of existing facilities.

(5) Sections 1910.1025(j)(2) and (j)(3)(ii)(D) insofar as they require biological monitoring and medical examination for zinc protoprohyrin; and Section 1910.1025(j)(3)(iii), which requires a multiple physician review mechanism.

(6) Section 1910.1025(m), dealing with signs.

(7) Section 1910.1025(r), startup dates, to the extent that its obligations are inconsistent with the substantive requirements of this order.

Protection for employees at risk must be maintained because lead has long been recognized as a major industrial health hazard. During the past several years, employers have been obligated to bring most of the standard's protective measures into place with the exception of the requirement to install engineering controls, which has been judicially stayed. There was general agreement during the rulemaking and judicial proceedings on the necessity of such provisions as respiratory usage, safe work practices, and a medical surveillance program, although the particulars may not have been resolved to the satisfaction of all affected employers. The deferral of the next major step, engineering controls, means however that there is more than sufficient time for the agency to review the provisions of the standard as a whole and provide adequate notice if changes to the standard seem warranted. New effective dates may well be necessary in such a case. Consequently, there seems little justification for disrupting the compliance schedules and activities during this period of review. As discussed above, however, the agency is separately addressing whether the effective date for the 60/40 trigger should be delayed.

Any comments and suggestions should be sent to the address noted above. Comments should be submitted by June 1, 1981.

5. *Authority.*

This document was prepared under the direction of Thorne G. Auchter, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution

Avenue, N.W., Washington, D.C. 20210. It is issued pursuant to section 6(b) of the Occupational Safety and Health Act (84 Stat. 1593; 29 U.S.C. 655).

Signed at Washington, D.C. this 14 day of April 1981.

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Assistant Secretary of Labor

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